IN THE

Supreme Court of the United States

October Term, 1963

No. 1044

EASTERN EXPRESS, INC.,
Petitioner

— *against* —

MACK WAREHOUSE CORPORATION and
EAVENSON & LEVERING COMPANY,

RESPONDENTS' BRIEF CONTRA PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. May the District Court grant leave to amend answers to requests for admissions to correct a formal error in the execution of said answer so as to conform to Rule 36 when no change is made in the answers as filed and no prejudice results to the adverse party?

2. Does not the local law requiring all cases in which parol evidence appears to be passed upon by the trier of fact apply equally when the portion of that record consists of admissions under Rule 36?

3. Is not the enforcement, interpretation and amendment of documents filed under Rule 36 within the sound discretion of the Judges of the Trial Court of the Learned Trial Judge and unless there is a manifest abuse of discretion, the decision of said Judge is binding?

COUNTER-STATEMENT OF THE CASE

This case was commenced on April 29, 1960 by Plaintiff's Complaint and thereafter was pending before the United States District Court at Philadelphia in excess of two and one-half years until it was called for trial on December 18, 1962 before Luongo, J. without a jury. Plaintiff filed on August 28, 1962 certain requests for admission shortly before the pre-trial conference on September 11, 1962 and on October 1, 1962 Defendants filed their Answer to said requests, a period of approximately two and one-half months before trial. No objections to the form of Answer filed in the last minute rush for trial were made nor any complaint as to formalities made until the opening of trial on December 18, 1962. When it was sought to enter all of said requests for admission as having been admitted due to inadvertent error in execution (21a, et seq), the Learned Trial Judge refused to disregard the answers because of the formal error to which no objections had been raised and reserved to counsel for Plaintiff the right to argue this question on proper Motions filed. No Motions have been filed in the Court below for a new trial or to reform the Findings so as to give the Learned Trial Judge an opportunity to pass upon this point. The Court of Appeals in the last sentence of its Opinion also found the Appellant's argument relating to the alleged misapplication of Rule 36 of no persuasion.

ARGUMENT CONTRA ALLOWANCE OF WRIT

Respondent respectfully urges this Honorable Court that there is no basis for the granting of the requested Writ of Certiorari in the within case. Rule 19 of this Court under Paragraph (b) thereof sets forth the considerations governing such review. The decision in this case is not in conflict with other circuits nor is there any question of the application of the Federal Rules of Civil Procedure, particularly Rule 36, which has not already been passed upon by this Court under its many decisions interpreting those Rules. For this reason it is respectfully submitted that no basis exists for a review of this proceeding which involved the exercise of the proper discretion of the Learned Trial Judge in the day to day interpretation of the application of Rule 36 so as to perform substantial justice and the liberality of interpretation that has been defined by prior decisions of this Court.

The purpose of the Federal Rules of Civil Procedure was to eliminate surprise in the trial of cases and to provide a means to secure all relevant information in advance of trial so that cases which are beyond dispute may be settled and those tried will be reduced in length to the extent agreement can be reached on formal questions and proofs, thereby eliminating testimony of unnecessary witnesses. In this respect Rule 36 has been a valuable tool in securing the admission of the authenticity of documents and similar matters which would otherwise be time consuming at trial. However, such requests for admission are intended only for cases where there is no real dispute and are not to be used where vital controversial issues of fact

leading to the heart of the question are involved. Petition of *Reinauer Oil Transport, Inc.*, 19 Fed. R.D. 5 (Mass.-1956); *Electric Furnace Co. v. Fire Association*, 9 F.R.D. 741 (Ohio-1949).

Upon learning of the oversight, Defendants' counsel asked leave of Court to file Amended Answers to Plaintiff's request for admissions which were identical to those previously filed but contained the signature of the President of the Defendants and the requisite verification. This document was received and filed with the Clerk of Court as Document No. 27 on December 19, 1962 and is a part of the record on appeal (31B).

The law is clear that a party in Federal proceedings may waive formal requirements by permitting the action to be joined and go to trial without objection thereto. The identical request of the Plaintiff was raised in *Manke v. U. S.*, 38 Fed. 2d 624 (9th cir. 1930) in which it was sought to introduce an unverified Answer which required verification as being of no force and constituting an admission of all of the averments in the Complaint. In that case the Court refused in the interest of justice so to do and granted the opportunity to so verify.

In *Gilbert v. General Motors*, 33 Fed. 2d 997 (2nd cir. 1943) cert. denied 319 U. S. 743, 65 S. Ct. 1031, the Court of Appeals for the Second Circuit and the Supreme Court of the United States refused to set aside an unverified answer to Plaintiff's request for admissions under circumstances similar to the case at bar. A similar result was reached in a housing case of *Woods v. Stewart*, 171 Fed. 2d 544 (5th cir. 1948).

A review of the development of Rule 36 is well set

forth by Wood, J. of this Circuit in *Johnstone v. Cronlond*, 25 Fed. 42 (Pa.-1960) in which he wisely sets forth that the proper forum for formal objections is prior to the day of trial. There is no prejudice to the moving party, the Plaintiff in this case, by the amendment. The Plaintiff is deprived only of proving the merits of his case by technicalities which have long ceased to exist in the jurisprudence of the Federal Courts.

Plaintiff's problem is further complicated by the law of the State of Pennsylvania which is here applicable requiring all cases in which the evidence contains live testimony rather than documentary evidence exclusively to go to the trier of fact: *Bartlett v. Rothschild*, 214 Pa. 421, 63 Atl. 1030 (1906). The Plaintiff called as its witnesses Mr. Foyle, Mr. Rosenfeld and Mr. Mack, all of whose testimony when supplemented by Defendants' appendix has been transcribed in this proceeding. Additional witnesses whose testimony has not been transcribed by Plaintiff or printed for the Court's consideration also appeared on its behalf.

Under these circumstances, the Learned Trial Judge, sitting as a jury, was required to judge the credibility of each of said witnesses together with the documentary evidence submitted and to then determine who he, as the trier of fact, believed. This the Learned Trial Judge did and found for the Defendants and since ample evidence exists to support this Finding in the testimony of Messrs. Foyle and Mack who were called as Plaintiff's witnesses, the Court on appeal cannot now disturb that Finding.

Counsel for Petitioner has quoted from and appears to rely upon the case of *Hickman v. Taylor*, 329 U. S. 495,

67 S. Ct. 385 (1947) as requiring the Discovery Rules to be accorded a "broad and liberal treatment." With this statement I cannot quarrel and am in full accord. It is interesting to note that at page 505 of the Hickman case, supra, this Court chose to overlook the faulty choice of the Petitioner herein of the discovery rule under which to proceed in the Lower Court and deemed it unwise to rest its decision upon this procedural irregularity in view of the liberal atmosphere surrounding the Rules. The language of the Court as follows is most interesting:

> "But, under the circumstances, we deem it unnecessary and unwise to rest our decision upon this procedural irregularity, an irregularity which is not strongly urged upon us and which was disregarded in the two courts below . . . The fact that the petitioner may have used the wrong method does not destroy the main thrust of his attempt. Nor does it relieve us of the responsibility of dealing with the problem raised by that attempt. It would be inconsistent with the liberal atmosphere surrounding these rules to insist that petitioner now go through the empty formality of pursuing the right procedural device only to re-establish precisely the same basic problem now confronting us. . ."

It is respectfully submitted that precisely the same situation and the same compulsions appear in the instant case, which objections were in fact corrected by proper amendment as soon as discovered and by leave of the Learned Trial Judge.

Accordingly, it is submitted that the Writ of Certiorari requested by Petitioner should be denied.

Respectfully submitted,

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